UNPUBLISHED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

ROY BALES, SR.,

Plaintiff,

vs.

JOHN F. AULT, RUSSELL BEHRENDS, PHIL KAUDER, IOWA DEPARTMENT OF CORRECTIONAL SERVICES; THOMAS J. MILLER, in his capacity as Iowa Attorney General; and UNKNOWN DEFENDANTS,

Defendants.

No. C03-4051-MWB

REPORT AND RECOMMENDATION ON MOTION TO DISMISS

This matter is before the court on the defendants' motion to dismiss, filed July 21, 2003. (Doc. No. 10) The plaintiff Roy Bales, Sr. ("Bales") resisted the motion on November 20, 2003. (Doc. No. 33) By order dated July 22, 2003, this matter was referred to the undersigned United States Magistrate Judge for the issuance of a report and recommendation. (Doc. No. 11)

Bales currently is an inmate at the Anamosa State Penitentiary ("ASP") in Anamosa, Iowa. He filed this action under 42 U.S.C. § 1983 to redress the alleged deprivation of his constitutional rights. Specifically, Bales seeks an injunction to prevent the enforcement of a prison property policy prohibiting inmates from keeping electric razors and beard trimmers. Bales also seeks $1,000,000 in damages, and court costs. (*See* Doc. No. 5)

The defendants deny they have violated Bales's constitutional rights. Specifically, the defendants John Ault, Russell Behrends, and Phil Kauder argue Bales cannot establish a violation of his Eighth Amendment or Fourteenth Amendment constitutional rights. The defendant Thomas Miller argues his role as a supervisor or an elected official is insufficient as a matter of law to establish a constitutional violation. Based on those arguments, the defendants assert Bales's Complaint must be dismissed. (*See* Doc. No. 10)

I. STANDARDS FOR A MOTION TO DISMISS

To establish his claim under 42 U.S.C. § 1983, Bales must show the defendants' conduct caused a constitutional violation, and the challenged conduct was performed under color of state law. *Reeve v. Oliver*, 41 F.3d 381, 383 (8th Cir. 1994) (citing *Alexander v. Peffer*, 993 F.2d 1348, 1349 (8th Cir. 1993)). *See also West v. Atkins*, 487 U.S. 42, 48, 108 S. Ct. 2250, 2254-55, 101 L. Ed. 2d 40 (1988); *Meyer v. City of Joplin*, 281 F.3d 759, 760-61 (8th Cir. 2002); *Dunham v. Wadley*, 195 F.3d 1007, 1009 (8th Cir. 1999). In considering the defendants' motion to dismiss, the court must assume all the facts alleged in the Complaint are true, and liberally construe the Complaint in the light most favorable to Bales. *See Coleman v. Watt*, 40 F.3d 255, 258 (8th Cir. 1994) (citing *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 101-02, 2 L. Ed. 2d 80 (1957)); *see also Young v. City of St. Charles*, 244 F.3d 623, 627 (8th Cir. 2001). In treating the factual allegations of the Complaint as true, the court "do[es] not, however, blindly accept the legal conclusions drawn by the pleader from the facts." *Westcott v. City of Omaha*, 901 F.2d 1486, 1488 (8th Cir. 1990) (citing *Morgan v. Church's Fried Chicken*, 829 F.2d 10, 12 (6th Cir. 1987), and 5 C. Wright & A. Miller, Federal Practice and Procedure § 1357, at 595-97 (1969)); *see also LRL Properties v. Portage Metro Housing Auths.*, 55 F.3d

1097, 1103 (6th Cir. 1995) (the court "need not accept as true legal conclusions or unwarranted factual inferences," quoting *Morgan, supra*). Under Federal Rule of Civil Procedure 12(b)(6), dismissal is appropriate "'only if it is clear that no relief can be granted under any set of facts that could be proved consistent with the allegations.'" *Alexander*, 993 F.2d at 1349 (quoting *Hishon v. King & Spalding*, 467 U.S. 69, 73, 104 S. Ct. 2229, 2232, 81 L. Ed. 2d 59 (1984)). *See also Broadus v. O.K. Indus., Inc.*, 226 F.3d 937, 941 (8th Cir. 2000).

II. BACKGROUND

On June 16, 2003, Bales filed an application to proceed *in forma pauperis*. (Doc. No. 1) Along with his application to proceed *in forma pauperis*, Bales submitted several other pleadings, including an application for appointment of counsel, a motion for an immediate injunction, a Complaint, and a jury demand. (Doc. Nos. 2, 3, 5 & 6, respectively) The Clerk of Court filed each of these pleadings on June 30, 2003. (*Id.*)

In his Complaint, Bales states as follows:

> If an inmate . . . [is misusing or abusing] an electric shaver or electric beard trimmer and a [correctional] officer catches the inmate . . ., it is the [correctional officer's right to issue] the inmate a major report and make the inmate dispose of that electrical appliance. There is no [excuse for misuse] of an electric shaver or beard trimmer . . . and there is no [excuse for misuse] or abuse [of] any . . . electrical appliances [which are in the inmate's possession and in the inmate's cell]. [For identification purposes, each] electric item [includes] the inmate's name and prison number . . . and each inmate holds his purchase receipts or Christmas gift receipts . . .

(Doc. No. 5) In addition, Bales alleges:

> The [defendants] are all acting . . . within a criminal conspiracy. . . . [It does not matter] what any inmate says

> [about] his . . . electrical appliances. . . . The . . . defendants are now trying to call electric razors and [electric] beard trimmers contraband.

(*Id.*) Bales believes he should be allowed to keep his electric razor or electric beard trimmer, and he argues all electrical appliances that were in use by inmates at ASP at the time the new property policy was instituted should be "grand fathered." (*Id.*)

In his motion for an immediate injunction, Bales alleges as follows:

> [I] had to save up very small amounts of money at a time . . . to be able to . . . purchase new electrical items. [I hold] receipts as verified proof of each electrical item purchased.

(Doc. No. 3) Bales states he owns several electrical appliances, including an electric shaver with a beard trimmer. Bales indicates he received the electric razor as a Christmas gift from his sister in 1994. He assesses the value of his electric shaver to be $101.78, including shipping and handling. (*Id.*)

In his Complaint and his motion for an immediate injunction, Bales refers to a memorandum dated June 9, 2003, directed to all ASP inmates. The memorandum provides as follows:

> Effective July 1, 2003 all ELECTRIC RAZORS and BEARD TRIMMERS will no longer be allowed in the institution, and considered CONTRABAND. If you currently are in possession of either of these items, you must take steps to send them out immediately. If you wish not to send them out[,] you can properly dispose of them by bringing them to [an appropriate corrections officer]. They can be donated to charity or destroyed as you wish. This action is being taken at the direction of current Department of Corrections Policy - INV #82 reference Personal Property. These items will not be "grand fathered" as the ASP Administration previously believed.

(Doc. No. 3, Attachment labeled Exhibit B)

On June 30, 2003, the court conducted an initial review of Bales's complaint. In its initial review order, the court granted Bales *in forma pauperis* status, and identified two possible claims based on the facts alleged by Bales -- a Fourteenth Amendment claim based on a property interest or liberty interest, and an Eighth Amendment claim based on cruel and unusual conditions of confinement. (Doc. No. 4) In addition, the court denied Bales's request for preliminary injunctive relief, denied his application for appointment of counsel, and ordered the defendants to file an answer or other dispositive motion. (*Id.*) On July 9, 2003, the court reconsidered Bales's request for counsel and granted the request. (Doc. No. 8)

On July 21, 2003, the defendants filed the instant motion. In their motion to dismiss, the defendants note Bales did not state what constitutional rights would be deprived by the change in the prison property policy. Defendants Ault, Behrends and Kauder argue the two possible constitutional claims the court identified must fail because Bales is unable to show the denial of an electric razor violates either the Fourteenth Amendment or the Eighth Amendment. Defendant Miller argues he must be dismissed from the case because he does not have statutory control or authority over the Iowa Department of Corrections. (*See* Doc. No. 10)

On July 29, 2003, attorney Patrick Ingram, appointed by the court to represent Bales in this case, filed a notice of his appearance in the case. (Doc. No. 14) On July 30, 2003, Bales filed a *pro se* resistance to the defendants' motion to dismiss. (Doc. No. 15) On August 7, 2003, Bales filed a *pro se* motion to add several plaintiffs to the case, and a motion seeking to have all discovery in the case be by way of deposition and not by written interrogatories. (Doc. Nos. 17 & 18) On August 8, 2003, the court denied both of these motions. (Doc. Nos. 19 & 20) The court also directed Bales to file all further motions through his appointed attorney. (Doc. No. 20) On September 5, 2003,

Mr. Ingram moved to withdraw as Bales's attorney, and requested additional time for Bales to respond to the defendants' motion to dismiss. (Doc. No. 21) On the same day, Bales filed a *pro se* motion seeking the appointment of a different attorney to represent him in the case, and a further *pro se* resistance to the defendants' motion to dismiss. On September 15, 2003, the court granted Mr. Ingram's motion to withdraw, extended to September 30, 2003, the deadline for Bales to respond to the motion to dismiss, and denied Bales's motion to appoint new counsel. (Doc. No. 26)

On September 17, 2003, Bales filed a *pro se* motion for discovery. (Doc. No. 27) On September 22, 2003, Bales filed a *pro se* motion to reinstate Mr. Ingram as his attorney, a motion for a non-telephonic hearing, and a motion for a writ of *habeas corpus ad testificandum*. (Doc. No. 28) On September 24, 2003, the court entered an order denying the September 22, 2003, *pro se* motions. (Doc. No. 29) On September 29, 2003, Bales filed a *pro se* motion for a further extension of time to file a *pro se* resistance to the defendants' motion to dismiss, and on October 2, 2003, Bales requested a hearing. (Doc. Nos. 30 & 31) On October 3, 2003, the court entered an order denying Bales's September 17, 2003, motion for discovery; his September 29, 2003, motion for an extension of time; and his October 2, 2003, request for a hearing. (Doc. No. 32) In the same order, the court reappointed Mr. Ingram as Bales's attorney in the case, and extended to November 14, 2003, the deadline for filing a resistance to the defendants' motion to dismiss. (*Id.*)

On November 20, 2003, Bales, through his attorney, filed an untimely resistance to the motion to dismiss. In his resistance, Bales argues the defendants' actions violated his Fourteenth Amendment due process rights and his Eighth Amendment rights. Bales does not resist defendant Miller's argument that he must be dismissed from the case. (*See* Doc. No. 33)

This matter has now been fully submitted, and the court turns to consideration of the defendants' motion to dismiss.

III. ANALYSIS

A. Fourteenth Amendment Due Process Claim

The defendants argue Bales cannot establish a violation of his Fourteenth Amendment due process rights. In particular, they argue the change in the prison property policy that required Bales to give up his electric razor does not constitute an "atypical and significant hardship" in relation to the "ordinary incidents of prison life," as recognized by *Sandin v. Conner*, 515 U.S. 472, 484, 115 S. Ct. 2293, 2300, 132 L. Ed. 2d 418 (1995). (Doc. No. 10-2, pp. 5-7) Further, the defendants argue Iowa Code section 904.508 allows the Iowa Department of Corrections and the superintendent of each facility to limit inmate property according to institutional policy. (*Id.*, pp. 7-9) Finally, to the extent Bales claims the taking of his electric razor is an unconstitutional seizure, the defendants argue such claim fails because a post-deprivation remedy is available to him, in the form of an action under the Iowa Tort Claims Act. (*Id.*, pp. 9-10)

Bales argues his due process rights were violated when the defendants instituted an across-the-board policy banning electric razors. (*See* Doc. No. 33) To support his position, Bales relies on *Lyon v. Farrier*, 730 F.2d 525, 527 (8th Cir. 1984). Based on *Lyon*, Bales asserts "the decision to take his personal property is irrational and thus is not [a] reasonable limitation or retraction in light of legitimate security concerns." (Doc. No. 33-2, p. 3) Bales does not appear to contest the defendants' assertion that the taking

of his electric razor is not an unconstitutional seizure because a post-deprivation remedy is available. (*Id.*)[1]

In order to prevail on a Fourteenth Amendment due process claim, Bales first must demonstrate that he was deprived of life, liberty, or property by government action. *See Singleton v. Cecil*, 155 F.3d 983, 987 (8th Cir. 1998). Clearly, the defendants did not deprive Bales of his life; thus, Bales must identify an implicated liberty or property interest in order to sustain his due process claim. From the Complaint and the resistance to the motion to dismiss, it is apparent Bales believes he has a liberty interest in retaining his electric razor that is derived from the prior version of the prison property policy. Bales does not appear to argue the new policy has deprived him of a property interest in the electric razor. Nevertheless, the court finds it is appropriate to consider Bales's claim in terms of both a liberty interest and a property interest.

The United States Supreme Court set forth the standard for determining a liberty interest claim in a prison setting in *Sandin*, as follows:

> States may under certain circumstances create liberty interests which are protected by the Due Process Clause. But these interests will be generally limited to freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force, nonetheless imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.

---

[1]Because Bales has not argued the taking of his electric razor is an unconstitutional taking, the court need not address this issue. Nonetheless, the court notes the defendants correctly assert that Iowa provides an adequate post-deprivation remedy. *See Hudson v. Palmer*, 468 U.S. 517, 533, 104 S. Ct. 3194, 2304, 82 L. Ed. 2d 393 (1984) (concluding "unauthorized intentional deprivation of property by a state employee does not constitute a violation of the procedural requirements of the Due Process Clause of the Fourteenth Amendment if a meaningful post-deprivation remedy for the loss is available"); Iowa Code ch. 669.

Sandin, 515 U.S. at 483-84, 115 S. Ct. at 2300. From this standard, it is clear a prisoner is entitled to procedural due process only if the restraint on liberty of which he complains imposes "atypical and significant hardship on [him] in relation to the ordinary incidents of prison life." *Id.*

With respect to the standard for determining a property interest claim, it is not clear from existing case law that the rationale of *Sandin* should be extended to property interest claims arising from prison conditions. The Eighth Circuit Court of Appeals has not yet determined whether *Sandin* applies to prisoners' property claims, and other circuit courts that have addressed the issue are divided. *Compare Cosco v. Uphoff*, 195 F.3d 1221, 1224 (10th Cir. 1999) (finding "atypical and significant hardship" methodology announced in *Sandin* applied to property claims brought by prisoners); *Backus v. Ward*, 151 F.3d 1028 (Table), 1998 U.S. App. LEXIS 11826 at *2, 1998 WL 372377 at *1 (4th Cir. 1998) (relying on *Sandin* to conclude inmate did not have constitutionally-protected liberty interest or property interest in a prison job, and thus could not claim his termination was without due process); *and Abdul-Wadood v. Nathan*, 91 F.3d 1023, 1025 (7th Cir. 1996) (suggesting *Sandin* applies to property claims brought by prisoners); *with Woodard v. Ohio Adult Parole Auth.*, 107 F.3d 1178, 1182-83 (6th Cir. 1997) (noting "the Supreme Court has made it clear that both state law and the Due Process Clause itself may create [a liberty] interest," while the prevailing doctrine instructs that "state law controls as to the existence of a property interest"); *Bulger v. United States Bureau of Prisons*, 65 F.3d 48, 50 (5th Cir. 1995) (finding *Sandin* "did not instruct on the correct methodology for determining when prison regulations create a protected property interest," and declining to extend the "atypical and significant hardship" methodology announced in *Sandin* to property claims brought by prisoners); *Martin v. Upchurch*, 67 F.3d 307 (Table), 1995 U.S. App. LEXIS 27519 at *5-6, 1995 WL 563744 at *2 (9th Cir. 1995) (concluding

prisoner "had no liberty interest in his prison job" because *Sandin* applied, and no property interest in his prison job because state law left prisoners' employment to discretion of prison officials). *See also Logan v. Gillam*, 96 F.3d 1450 (Table), 1996 U.S. App. LEXIS 23344 at *10, 1996 WL 508618 at *3 (7th Cir. 1996) (citing *Abdul-Wadood*, 91 F.3d at 1025) (finding *Sandin* applied to claims that prison regulation created federally-enforceable liberty interests and property interests).

Among those courts that have addressed whether the methodology announced in *Sandin* applies to property claims brought by prisoners, the Tenth Circuit Court of Appeals's thorough analysis in *Cosco* is most persuasive. In *Cosco*, inmates acquired personal property including "hobby" and legal materials, which they kept in their cells. Shortly after the murder of a corrections officer, prison authorities adopted a policy that limited the amount of property prisoners could keep in their cells. The new policy provided storage of unauthorized materials for 90 days, and gave inmates the opportunity to ship their property to an alternative off-prison location of their choice. As a result of the new policy, prison officials removed property from inmates' cells.

Several inmates filed suit under 42 U.S.C. § 1983, claiming prison officials had deprived them of their property without due process. After exhaustively discussing relevant Supreme Court cases decided before *Sandin*, and circuit court cases decided after *Sandin*, the court held *Sandin* applied to property claims brought by prisoners. *Cosco*, 195 F.3d at 1223-24 Applying *Sandin* to the facts of the case, the *Cosco* court explained:

> Appellants claim in the case at hand that mandatory language in the regulations governing what the prisoners could keep in their cells created a property interest or entitlement and ensured them a continuation of the same interest absent due process. That is precisely the methodology rejected by the Supreme Court in *Sandin*. The regulation of type and quantity of individual possession in cells is typical of the kinds of

> prison conditions that the Court has declared to be subject to the new analysis set forth in *Sandin*. Applying the Court's analysis, we cannot say that the new regulations promulgated in this case present "the type of atypical, significant deprivation [of their existing cell property privileges] in which a State might create a [property] interest."

Id. (citing *Sandin*, 515 U.S. at 486, 115 S. Ct. at 2301).

Because the facts of *Cosco* are similar to those presented here, and the analysis of *Sandin* in *Cosco* is sound, it is appropriate to adopt the Tenth Circuit Court of Appeals's rationale. Thus, the court finds the "atypical and significant hardship" methodology announced in *Sandin* applies to property claims brought by prisoners.

With respect to Bales's argument that he has a liberty interest in the old prison property policy which allowed him to retain his electric razor, the claim does not satisfy standards announced in *Sandin*. The only hardship Bales identifies is that he is no longer able to use an electric razor or beard trimmer because of the new prison property policy. This is not an atypical and significant hardship. *See Rahman X v. Morgan*, 300 F.3d 970, 974 (8th Cir. 2002) (concluding, under *Sandin*, that inmates' inability to watch television is not a significant hardship, even when combined with the other minor deprivations alleged). Therefore, Bales's claim that he has a liberty interest in the old prison property policy fails as a matter of law.

To the extent Bales asserts a property interest claim, the claim fails for similar reasons. The new prison property policy does not create an atypical, significant deprivation of Bales's property privileges. *See Cosco*, 195 F.3d at 1224 (concluding the state did not create a property interest by implementing the new prison property policy because the permanent separation of an inmate from his property does not amount to an atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life). *See also Winnie v. Clarke*, 893 F. Supp. 875, 881-82 (D. Neb. 1995)

(concluding inmate had no liberty interest in reimbursement for wages lost while he was in disciplinary segregation even though prison officials placed inmate in disciplinary segregation for violating a prison regulation that was later reversed); *Pryor-El v. Kelly*, 892 F. Supp. 261, 270-71 (D. D.C. 1995) (concluding prison officials did not violate due process when they removed and sent home property from inmate's cell that exceeded prison regulations because decision to remove property from the cell was administrative, inmate still retained control over the property, and inmate had no liberty interest).

Bales's due process claim also must fail because prison officials gave him sufficient process. Prison officials informed Bales about the change in the prison property policy approximately one month before implementing it, and permitted Bales to either send the electric razor out of ASP, donate it to a charity, or have it destroyed. Providing Bales with these options constituted sufficient due process in the context of the alleged deprivation. It follows, then, that Bales has not suffered a deprivation which is sufficient to trigger constitutional due process protections.[2]

In sum, no constitutional procedural due process protections were implicated by the prison's actions because prison officials gave Bales sufficient process before implementing the new property policy, and Bales is unable to show an atypical and significant hardship. Bales has failed to state a due process claim upon which relief can be granted.

---

[2] Having determined *Sandin* applies to liberty interests and property interests, the court need not address Bales's argument that the defendants cannot show the deprivation of his property under the prison policy is reasonable in light of legitimate security concerns of the institution, or the defendants' assertion that state law controls as to the existence of a property interest. Nevertheless, the court notes Bales's reliance on *Lyon* is unavailing because the opinion preceded the Supreme Court's decision in *Sandin*, and because the new prison property policy addressed the alleged prior misuse of electric razors by inmates and did not ban all razors. *See Beck v. LaFleur*, 257 F.3d 764, 766 (8th Cir. 2001) (plaintiff failed to allege facts sufficient to state a constitutional claim that defendants deprived inmate of property without due process of law).

Accordingly, the defendants' motion to dismiss should be granted pursuant to Federal Rule of Civil Procedure 12(b)(6), with respect to Bales's Fourteenth Amendment claims.

B. Eighth Amendment Cruel and Unusual Punishment Claim[3]

Based on the applicable standard, the defendants argue Bales cannot establish an Eight Amendment cruel and unusual punishment claim. Specifically, the defendants contend:

> Bales fails to establish that the [ban of electric razors at ASP] denies him . . . any long term use of any hygiene items. . . . there are no allegations [in the complaint that] Bales was denied visits to the barber, regular razor or other services. In short, Bales has other available methods by which he could shave. The lack of one particular method, namely an electric razor, does not in and of itself establish an Eighth Amendment constitutional violation.

(Doc. No. 10-2, pp. 10-11)

Bales argues the defendants' actions violated the Eighth Amendment, stating:

> [He] has in accordance with the rules provided a short statement of how his rights are violated, that is . . . he has been denied personal hygiene items, in this case an electric razor. [Although defendants state] that there are alternatives, . . . that would be an issue for a summary judgment, not a motion to dismiss.

(Doc. No. 33-2, pp. 3-4)

The Constitution does not mandate comfortable prisons, but neither does it permit inhumane ones. *Farmer v. Brennan*, 511 U.S. 825, 832, 114 S. Ct. 1970, 1976, 128 L.

---

[3] Beyond due process, prisoners retain Eighth Amendment protections from arbitrary state action. *Sandin*, 515 U.S. at 487 n.11, 115 S. Ct. 2293, 2302 n.11. *See also Myers v. Hundley*, 101 F.3d 542, 544 (8th Cir. 1996) (stating a long-term, repeated deprivation of adequate hygiene supplies violates inmates' Eighth Amendment rights) (citing *Howard v. Adkinson*, 887 F.2d 134, 137 (8th Cir. 1989)).

Ed. 2d 811 (1994). The treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment. *Helling v. McKinney*, 509 U.S. 25, 31, 113 S. Ct. 2475, 2480, 125 L. Ed. 2d 22 (1993). The Eighth Amendment prohibits the infliction of "cruel and unusual punishment." U.S. Const., Amend. VIII. To establish an Eighth Amendment violation, a prisoner must show the alleged deprivation, viewed objectively, is "sufficiently serious," and the prison officials' actions, viewed subjectively, demonstrate a "deliberate indifference" to the prisoner's health or safety. *Simmons v. Cook*, 154 F.3d 805, 807 (8th Cir. 1998). A deprivation is "sufficiently serious" if it denies a prisoner the "minimum civilized measures of life's necessity." *Wilson v. Seiter*, 501 U.S. 294, 298, 111 S. Ct. 2321, 2324, 115 L. Ed. 2d 271 (1991) (internal quotations omitted).

Bales's alleged deprivation is not "sufficiently serious." It diminishes the significance of the Eighth Amendment to suggest that a ban on the possession of an electric razor or beard trimmer amounts to cruel and unusual punishment. *See Rahman X*, 300 F.3d at 974 (inmate's Eighth Amendment claim failed because ballpoint pens and television are not necessary for a civilized life). Accordingly, the defendants' motion to dismiss should be granted with respect to Bales's Eighth Amendment claims.

C. Claims Against Defendant Thomas Miller

The defendants argue the claims against the defendant Thomas Miller must be dismissed because he does not have statutory control or authority over the Iowa Department of Corrections, Bales is unable to proceed based on a theory of *respondeat superior*, and Bales has failed to allege sufficient facts to establish a conspiracy. (*See* Doc. No. 10-2, pp. 4-5) Bales does not resist these arguments. Because the defendants' arguments are properly supported and unresisted, the defendant Thomas Miller should be

dismissed from this action. *See* LR 7.1(e)-(f); *see also Askew v. Millerd*, 191 F.3d 953, 957 (8th Cir. 1999) (finding insufficient evidence to establish necessary conspiracy elements); *Ellis v. Norris*, 179 F.3d 1078, 1079 (8th Cir. 1999) (holding prisoner must allege defendants' personal involvement or responsibility for the alleged constitutional violations to state a 42 U.S.C. § 1983 claim); *Liebe v. Norton*, 157 F.3d 574, 579 (8th Cir. 1998) (holding liability under 42 U.S.C. § 1983 may not be grounded upon a *respondeat superior* theory).

IV. CONCLUSION

For the foregoing reasons, **IT IS RECOMMENDED**, unless any party files objections[4] to the report and recommendation in accordance with 28 U.S.C. § 636(b)(1)(C) and Fed. R. Civ. P. 72(b) within ten (10) days of the service of a copy of this report and

[4]A party filing objections must specify the parts of the Report and Recommendation to which objections are made. In addition, the objecting party must specify the parts of the record, including exhibits and transcript lines, which form the basis for such objections. *See* Fed. R. Civ. P. 72. Failure to file timely objections may result in waiver of the right to appeal questions of fact. *See Thomas v. Arn*, 474 U.S. 140, 155, 106 S. Ct. 466, 475, 88 L. Ed. 2d 435 (1985); *Thompson v. Nix*, 897 F.2d 356, 357-58 (8th Cir. 1990).

recommendation, that the defendants' motion to dismiss be granted, the complaint be dismissed, and judgment be entered accordingly.

IT IS SO ORDERED.

DATED this 8th day of January, 2004.

PAUL A. ZOSS
MAGISTRATE JUDGE
UNITED STATES DISTRICT COURT